SPECIAL CONTRIBUTION

INNOVATIVE JUSTICE

(*Sir Ninian Stephen Lecture 17 September 2022*)

THE HONOURABLE ANDREW S BELL*

I. INTRODUCTION

Vice-Chancellor, Pro-Vice Chancellor, Dean, Members of the Faculty, Distinguished Guests, Alumni, Students, Ladies and Gentlemen.

I begin today by acknowledging the traditional custodians of the land on which we meet, the Awabakal and Worimi peoples, and pay my sincere respects to their Elders, past and present, and extend those respects to all First Nations people.

I am particularly delighted to see and acknowledge the presence of my very good friend, the Honourable Kevin Lindgren AM KC, who played such an integral role in the foundation of the teaching of law at the University of Newcastle and who, of course, went on to have a distinguished career at the New South Wales Bar and then on the Federal Court of Australia. In fact, Kevin and I were members of the same chambers, and he took up his judicial position shortly before I came to the Bar. He has, however, endured many of my speeches over the years (for which I am grateful) and there are few lawyers in New South Wales who command the universal respect and admiration that he does. It is wonderful that he can be here as a proud Novacastrian.

I might add that my colleague, Justice Julie Ward, President of the New South Wales Court of Appeal, is also a proud Novacastrian.

Now, your dynamic Dean, Professor Sourdin, has presented me with a significant challenge this evening. First, I am to deliver the Sir Ninian Stephen Lecture which is, of course, a great honour.

* Chief Justice of New South Wales. Speech delivered on 17 September 2022. I express my thanks to my Research Director, Ms Monique Pankhurst, for her considerable assistance in the preparation of this address. I also acknowledge the contribution of Presiding Magistrate Sue Duncombe of the New South Wales Youth Koori Court within the Children's Court of New South Wales and am grateful to Judge Ellen Skinner, President of the Children's Court, and Magistrate Duncombe for the opportunity to observe the working of workings of the Court firsthand.

Secondly, I am to do so on the occasion of the Newcastle Law School's 30th anniversary, a great achievement for which I am very pleased to offer congratulations.

But thirdly, I am to do both of these things at a Black Tie Dinner Dance marking that anniversary at which a lengthy lecture might not make me the most popular man in the room. Can I just say, 'Thank you Tania!'. Thank goodness, from my point of view, that the Newcastle Knights are not in the finals!

In all seriousness, it is a great honour to have been invited tonight both to mark the Law School's 30th Anniversary and to deliver the Sir Ninian Stephen Lecture. Sir Ninian was a most urbane man, a great lawyer and High Court judge who commanded profound respect and whose judgments were written with a clarity that was born of an exceptional grasp of legal principle and an innate sense of justice. He then, of course, served a distinguished seven-year term as Governor General between 1982-1989 and his career was one which richly deserves to be celebrated in the form of this lecture.

As to the Law School's 30th Birthday, it is a very significant hallmark. I remember Justice Robertson Wright telling me, when I was at university but he had already gone to the Bar, that it doesn't really matter what you get up to in your 20s so long as you have settled down and got a real job by 30! I think that he was justifying his own experience! But 30 years *is* a mark of significant maturity, and I know from previous very happy visits to Newcastle that your law school is one of the best in the country, with excellent academic staff, excellent facilities and a wonderful *esprit de corps*.

It has a particular reputation for clinical legal training and a keen interest in 'innovative justice', which is the topic that I have taken for this lecture, a fuller version of which will be available for your consumption through the Faculty.

As it happens, Sir Ninian Stephen was conscious of the advantages new law schools can have over established schools, and he spoke of this exactly 30 years ago, as fate would have it, not in Newcastle but at the coincident opening of the Law School at Griffith University in Brisbane. His words then could have been equally applicable to this Law School's position in 1992:

> […] for a law school to be young in years is by no means any bar to the attainment of excellence. Sometimes quite the contrary. […] new-born status [may be] a positive advantage because this allows it from the start to fashion quite precisely to the needs of today and tomorrow all that it teaches, rather than having to reshape existing and sometimes outmoded structures in an endeavour to keep up with the swiftly changing needs of present day law graduates and of the community they will serve. Those changing needs reflect the society in which they will function and here in Australia that society is itself in an unprecedented state of change.[1]

[1] Sir Ninian Stephen, 'The Opening Ceremony of the Griffith University Law School' (Speech, Griffith University, 24 February 1992) 3.

II. LEGAL INNOVATION

To some critics of the legal system, the fact that quills are no longer used to sign documents might be thought to be as innovative as we lawyers get! And I understand that the ceremonial robes judges wear on formal occasions such as swearing-ins and admission ceremonies don't do a lot for our reputation as innovators. Such traditions are, however, defensible in terms of the symbolic continuity of the rule of law in our State. In that context, the Supreme Court of New South Wales will celebrate its bicentenary in 18 months' time, and this celebration will involve a formal sitting in Newcastle to mark the occasion.

But traditionalism for some purposes does not mean that lawyers cannot be innovative for other purposes. We are, and must continue to be.

One can make this point by reflecting upon the legal landscape almost exactly 40 years after the date Sir Ninian Stephen left the High Court to take up his position as our 20th Governor General. There have been so many innovative changes in that period in terms of both substantive and procedural law.

The then nascent *Trade Practices Act 1974* (Cth) and the *Insurance Contracts Act 1984* (Cth) were radical legislative reforms that gave consumers protections never before enjoyed and which could not be excluded by contract. No-fault divorce was less than ten years old.[2] And, on the procedural side, alternative dispute resolution, the great interest of your Dean, was regarded with hostility by the legal profession.[3] And class actions, now such a familiar part of our legal landscape, could not have been imagined. They were regarded as 'American' and, therefore, with great suspicion and scepticism.[4]

I will turn to innovation in the criminal justice system later in this lecture but first will make some more general comments about innovation.

About a month ago, David Gonski AC delivered the New South Wales Bar Association's annual Bathurst Lecture on Commercial Law in the Banco Court. Mr Gonski is, of course, one of Australia's leading business figures, company directors and philanthropists, the long-term Chancellor of the University of New South Wales and also an innovative thinker. He spoke of the challenges of cyber security for company directors, and the need for innovative thinking and responses to counter such threats. In an earlier speech, Gonski has said, and I agree with his sentiment, that '[t]o improve the world and our lives within it, we must constantly

[2] Introduced with the passing of the *Family Law Act 1975* (Cth).

[3] See Stephen Colbran et al, 'Chapter 3: Alternative Dispute Resolution' in Stephen Colbran et al (eds), *Civil Procedure Commentary and Materials* (LexisNexis Butterworths, 7th ed, 2019) 90-96. See generally Peter Dwight, 'Commercial Dispute Resolution in Australia: Some Trends and Misconceptions' (1989) 1(1) *Bond Law Review* 1; Julian Riekert, 'Alternative Dispute Resolution in Commercial Disputes: Quo Vadis?' (1990) 11 *Australian Construction Law Newsletter* 17.

[4] See Damian Grave and Helen Mould (eds), *25 years of Class Actions in Australia* (Ross Parsons Centre of Commercial, Corporate and Taxation Law, 2017) 8-12.

question the status quo and try to find points of change, and then invest in making those changes, hopefully for the betterment of society'.[5] Importantly, 'a failure to think in an innovative way will result in decay'.[6]

When one speaks of innovation in the legal system, there is much that can be discussed. Some think immediately of technology and important innovations in the hearing of court cases, which proved so important during the pandemic. High quality Audio Visual Links (AVL), underpinned by high-speed internet connections, and the use of platforms, such as Zoom and Microsoft Teams, permitted court hearings of many different kinds to continue to occur despite limitations on people's movement.

And there have been so many other changes driven by technology that have impacted the practice of law. There is now really no such thing as an unreported judgment, as most judgments of superior courts are published on court websites and platforms such as AustLII and Caselaw. And judgments given in other superior courts around the world are virtually instantly available for consumption and analysis as soon as they are delivered. Practitioners no longer need to wait, as Sir Ninian Stephen no doubt did, for the arrival of the Weekly Law Reports by mail from England to discover what the House of Lords and the Privy Council had decided.

But it is not just the mode of receipt of legal information in the form of judgments that has changed, it is also the manner in which that information is dealt with. When I started at the Bar, many barristers still had their Law Reports 'noted up' by reference to legal citators which noted whether particular reported decisions had been followed, applied, cited, doubted or overruled. Now all of that can also be done with the click of a mouse, using tools such as CaseBase.

When I was writing my doctorate 30 years ago, I had to travel to the Columbia University Law Library to access some articles from American law journals that were not available at the Bodleian Law Library in Oxford. Today, they are all online and search tools are powerful.

Powerful search tools and technology are also employed in discovery exercises in large-scale commercial litigation, and we are beginning to see the development and exploration of the uses of Artificial Intelligence in the legal profession. That is a very large and complex topic at many different levels, and I do not intend to explore it on a Saturday night!

When one speaks of justice innovation, it is important not to think only, or even predominantly, in terms of technology. What I wish to do in the balance of my lecture is to draw your attention to some very important innovations in the criminal justice system, especially surrounding sentencing, including in relation to the Indigenous community whose grossly disproportionate incarceration rate registers as one of our greatest national failings and challenges. As is said in the Uluru Statement from the Heart

[5] David Gonski, *I Gave a Gonski: Selected Speeches* (Penguin Books, 2015) 150.
[6] Ibid.

> Proportionally, we are the most incarcerated people on the planet. We are not an innately criminal people. Our children are alienated from their families at unprecedented rates. This cannot be because we have no love for them. And our youth languish in detention in obscene numbers. They should be our hope for the future.[7]

This is only part of the Uluru Statement which, for those who have not read it, is an eloquent, accurate and powerful statement which looks forward to a 'fuller expression of Australia's nationhood' with great dignity.[8] It has my strong support.

III. Innovation in the Criminal Justice System

When one talks of innovation in our criminal justice system, there is often a range of views and a lack of consensus regarding the forms and directions changes might take in practice.[9]

Nor is change to the system morally or politically neutral. Take, for example, the 'law and order' rhetoric, which has been deployed time and again by governments and aspiring governments for political gain. Governments and opposition parties are quick to assert that their policies, not those of their opponents, will make communities safer for Australians, and send a clear message to those who are tempted to commit crimes (assuming that they are listening) that 'enough is enough'.[10] Typically, the assertions focus on introducing more punitive measures, but the costs and wisdom of such an approach are contestable, and certainly more nuanced and sophisticated than can be accommodated on an early-morning drive-time radio program.

As debates about crime and justice continue to evolve in Western neoliberal jurisdictions like Australia, there is one thing that attracts a moderate degree of public consensus: that is, the characterisation and recognition of crime as a social problem.[11] Accordingly, innovations which offer solutions and responses to the harms and costs of crime appear less likely to be rebuffed at face value than other initiatives.[12]

The costs of crime are great at many different levels: most obviously to victims, whether victims of physical or emotional violence or theft, but also to the community more generally in terms of not only the immediate costs of incarceration, which are vast,[13] and the long term costs which incarceration itself can often generate when prisoners are returned to the community and, sadly and expensively in some cases, to a life of

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[7] Uluru Statement from the Heart (National Constitutional Convention, 26 May 2017).

[8] Ibid.

[9] Hannah Graham and Rob White, 'The Ethics of Innovation in Criminal Justice' in Jonathan Jacobs and Jonathan Jackson (eds), *The Routledge Handbook of Criminal Justice Ethics* (Routledge, 2016) 267, 267.

[10] Rick Sarre, 'We Get the Crime We Deserve: Exploring the Disconnect in "Law and Order" Politics' (2011) 18 *James Cook University Law Review* 144, 144.

[11] Graham and White (n 9) 271. See Julian Roberts and Mike Hough, *Changing Attitudes to Punishment: Public Opinion, Crime and Justice* (Willan Publishing, 2002).

[12] Graham and White (n 9) 272.

[13] See Anthony Morgan, *How Much Does Prison Really Cost? Comparing the Costs of Imprisonment with Community Corrections* (Report No 5, Australian Institute of Criminology, 24 April 2018); Productivity Commission, *Report on Government Services – Corrective Services* (Report, 22 January 2021).

further crime. There is also a long-term cost in the criminal justice system to 'one-size-fits-all thinking', even though it may be politically and financially attractive in the short term.[14]

Innovation disrupts accepted allocations of capital, resources and sustainability in the criminal justice system. The more radical and disruptive innovation is, the greater its initial struggle for legitimacy,[15] and the more pressing the need for empirical data and research to measure its utility and justify its maintenance.

IV. COMMUNITY-BASED ORDERS

The first innovation I wish to discuss relates to community-based orders and, in particular, the relatively recent introduction of the Community Correction Order (CCO), which has been available as a sentencing option in New South Wales since September 2018,[16] when it replaced the previous scheme of home detention orders, good behaviour bonds and community service orders.[17]

Of course, the philosophy of community correction has long been controversial, contested and subject to the dynamic nature and vagaries of the political climate.[18] In large part, its uptake has reflected changes in community and government attitudes about the effectiveness of imprisonment in reducing crime.[19] Despite occasional fluctuations, concerns about the inability of prisons to reduce offending, or, in some cases, that incarceration actually *increases* future offending as well as rising prison costs, have shifted attention to community-based alternatives.[20]

Australian research over the last decade or so on actual public opinion on sentencing has revealed that, while members of the public demonstrated a preference for retaining deprivation of liberty for very serious offences, they nevertheless strongly support non-punitive approaches and alternatives to incarceration, as well as better services and programmes to address the underlying determinants of crime, such as mental and physical health services and substance abuse treatment, prison diversion programmes, raising awareness for prison alternatives, and a commitment to allocating public funds to non-incarceration options.[21] Survey participants identified equity and fairness, a prevention focus, and community involvement as principles that should underpin offender treatment.[22]

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[14] Vera Institute of Justice, *The Potential of Community Corrections to Improve Safety and Reduce Incarceration* (Report, 2013).

[15] Graham and White (n 9) 283.

[16] Following the commencement of the *Crimes (Sentencing Procedure) Amendment (Sentencing Options) Act 2017* on 24 September 2018.

[17] See New South Wales, *Parliamentary Debates*, Legislative Assembly, 11 October 2017, 2-7 ('*Parliamentary Debates*')

[18] Andrew Groves, 'Community-Based Corrections/Justice' in Darren Palmer et al (eds), *Crime & Justice: A Guide to Criminology* (Thomson Reuters, 2016) 465-466.

[19] Ibid 468-470.

[20] Ibid 468.

[21] See Paul Simpson and Tony Butler, 'Imprisonment and its Alternatives: What do the Public ReallyThink?', *The Conversation* (online, 19 June 2015) 1 <https://theconversation.com/ imprisonment-and-its- alternatives-what-do-the-public-really-think-40375>; Paul Simpson et al, 'Assessing the Public's View on Prison and Prison Alternatives: Findings from Public Deliberation Research in Three Australian Cities' (2015) 11(2) *Journal of Public Deliberation* 1; Craig GA Jones and Don J Weatherburn, 'Willingness to Pay for Rehabilitation Versus Punishment to Reduce Adult and Juvenile Crime' (2011) 46(1) *Australian Journal of Social Issues* 9. See also Lorana Bartels, Robin Fitzgerald and Arie Freiberg, 'Public Opinion on Sentencing and Parole in Australia' (2018) 65(3) *Probation Journal* 269, 277-279.

[22] Simpson et al (n 21).

The fundamental question of how best to manage offenders remains a highly contested topic. Those in favour of community corrections often cite the maintenance of social ties with family and legitimate employment, avoidance of harmful cultures of custodial violence and participation in restorative processes to assist victims as key benefits.[23] The debate reached a head during the 1960s, when the notion of community rehabilitation was enthusiastically endorsed and funded.[24] This enthusiasm waned, however, when, in 1974, prominent American sociologist, Robert Martinson, claimed that 'nothing works' in offender rehabilitation.[25] The 1980s saw the proliferation of a more punitive approach, defined by punishment and intensive surveillance.[26]

By the 1990s, we saw a return to more positive philosophies of rehabilitation.[27] This was a significant time in the history of criminal justice that, in many ways, has shaped contemporary thinking about corrections. Specifically, it marked a shift away from simply punishing those who 'made bad choices', to an approach combining punishment with 'helping' offenders through treatment, reskilling and reintegration, based on empirical evidence.[28] Importantly, it challenged traditional 'either/or thinking' about punishment and rehabilitation.[29]

Some of the earliest forms of community-based orders were diversion programs. Indeed, diversion and the use of police discretion towards drug users and other offenders have been mainstream police practice for some time, particularly towards young offenders.[30] But, for the most part, implementation largely rested on informal mechanisms of diversion such as police discretion to not charge an offender and/or ad hoc court-based services referring offenders before the courts, or soon to be before courts, to various community treatment programs.[31]

Throughout the 1980s and 1990s, states and territories devised a number of initiatives specifically aimed at diverting drug offenders. Two of the earliest schemes were adopted in South Australia in the 1980s, namely, the Drug Assessment and Aid Panels and the Cannabis Expiation Notice Scheme.[32] The former was introduced in 1984 and provided assessment and treatment for illicit drug users (excluding cannabis) prior to sentencing in court.[33] The latter was introduced in 1987 and provided cannabis users with expiation notices as an alternative

[23] See Julain V Roberts, *The Virtual Prison, Community Custody and the Evolution of Imprisonment* (Cambridge University Press, 2004).

[24] See Deborah King, 'Changes in Community Corrections: Implications for Staff and Programs' in Sandra McKillop (ed), *Keeping People Out of Prison* (Australian Institute of Criminology, 1990).

[25] Robert Martinson, 'What Works? Questions and Answers about Prison Reform' (1974) 10(1) *The Public Interest* 22.

[26] Groves (n 18) 469.

[27] Donald A Andrews and James Bonta, 'Rehabilitating Criminal Justice Policy and Practice' (2010) 16 *Psychology, Public Policy and Law* 39.

[28] Groves (n 18) 469.

[29] Ibid. See also Joan Petersilia, 'The Current State of Probation, Parole and Intermediate Sanctions' in Joan Petersilia (ed), *Community Corrections: Probation, Parole, and Intermediate Sanctions* (Oxford University Press, 1998) 2.

[30] Shona Morrison and Marilyn Burdon, *The Role of Police in the Diversion of Minor Alcohol and Drug-Related Offenders* (*National Campaign Against Drug Abuse Monograph Series*, 2000).

[31] Ibid; The Alcohol and Drugs Council of Australia, *Best Practice in the Diversion of Alcohol and other Drug Offenders* (Report, October 1996).

[32] Caitlin Hughes and Alison Ritter, *A Summary of Diversion Programs for Drug and Drug-Related Offenders in Australia* (Drug Policy Modelling Program Monograph Series, 2008) 4.

[33] Ibid.

to prosecution in court.[34] Since then, diversion programs have been utilised for all types of offenders and offending, from young offenders to First Nations offenders and those suffering from mental illness.

Specialist courts have also played an important role, including in New South Wales, where the Drug Court was established in Parramatta in February 1999.

Last year, the New South Wales Government announced its expansion of the Drug Court program to Dubbo, a project involving a $27.9 million investment in the central-northern New South Wales city over four years.[35] The announcement came on the back of recommendations for the reach of the Drug Court to be broadened, which were made by the Special Commission of Inquiry into the Drug 'Ice'[36] and the NSW parliamentary inquiry into First Nations over-incarceration and deaths in custody.[37] The expansion means that Dubbo joins Drug Court sites in Sydney, Parramatta and the Hunter.

For more than 20 years, the Drug Court has been diverting those individuals facing prison time for a non-violent offence into an intensive and therapeutic program of supervision and treatment of the underlying factors of drug dependency.[38] The Commission of Inquiry into Ice specifically recommended the expansion of the Drug Court to priority regional areas, noting that the lack of treatment services in regional and remote New South Wales was the subject of extensive evidence to the Inquiry.[39] It is critical that each regional and rural health area have the ability to provide access to detoxification,[40] rehabilitation, case management and relevant services, but the reality is that these services remain both scarce and difficult to access.[41]

In announcing the expansion, New South Wales Attorney-General Mark Speakman SC noted that the Court will help break the cycle of drug dependency in affected populations of Dubbo and surrounding regions.[42] It will do so by helping participants address the root causes of the problems that have underpinned their offending behaviour and will aim to enable offenders to overcome their addiction to make a positive contribution to their regional community.[43] Importantly, the Attorney said '[i]f we're going to tackle addiction and address drug use, a health response, not just a criminal justice response is required'.[44]

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[34] Ibid.

[35] New South Wales Government, 'Drug Court Expands to Dubbo' (Media Release, Department of Premier and Cabinet, 17 June 2021) ('Drug Court Expands to Dubbo').

[36] Dan Howard, *Special Commission of Inquiry into Crystal Methamphetamine and Other Amphetamine-Type Stimulants* (Report, Vol 1, January 2020) ix ('*Special Commission of Inquiry into Crystal Methamphetamine and Other Amphetamine*').

[37] Select Committee on the High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody, Parliament of New South Wales, *The High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody* (Report No 1, 15 April 2021) xii ('*The High Level of First Nations People in Custody*').

[38] Amy Dale, 'The News Our Region Has Been Waiting For: Drug Court Coming to Dubbo', *Law Society Journal Online* (online, 18 June 2021) <https://lsj.com.au/articles/the-news-our-region-has-been-waiting-for-drug-court-coming-to-dubbo/>.

[39] *Special Commission of Inquiry into Crystal Methamphetamine and Other Amphetamine-Type Stimulants* (n 36) ix.

[40] Ibid, citing New South Wales Government, *NSW Drug Summit 1999: Government Plan of Action* (Report, 1999).

[41] *Special Commission of Inquiry into Crystal Methamphetamine and Other Amphetamine-Type Stimulants* (n 36) ix.

[42] 'Drug Court expands to Dubbo' (n 35).

[43] Ibid.

[44] Ibid.

The Honourable Roger Dive, who led the State's specialist Drug Court for more than 17 years, has described the Drug Court as a 'solutions-based court',[45] which is apt, given that there is evidence to support the view that the Court helps offenders make long-term changes.[46] His Honour noted that the Dubbo Drug Court is funded to manage up to 80 participants at any one time and that he is expecting 'that Dubbo will be able to handle everyone who should get the opportunity to do a drug court programme'.[47]

Although diversion programs have broad eligibility criteria, the main premise is consistent – once the offender is accepted into the program, the process of sentencing is adjourned (either through granting bail, or placement under a supervision order) to allow the offender to receive assistance to address the factors that likely contributed to their offending, such as drug dependence or mental illness, through the development of a rehabilitation and supervision plan.[48] Once the program is completed, the offender is sentenced with their progress towards rehabilitation being taken into account, which, depending on the nature of the offences, may result in dismissal of the matter or conviction without penalty.[49]

Such diversion programs must be viewed with cautious optimism, as nationally, recidivism outcomes post-program are not consistent.[50] While some studies have reported no difference in recidivism for offenders who have completed programs,[51] there have been some encouraging findings. An evaluation of the New South Wales Drug Court found that drug program participants were less likely to be re-convicted than those who were given conventional sanctions, such as terms of imprisonment.[52] An analysis of the Magistrates Court Diversion Program in South Australia revealed lower rates of criminal activity post-program, with two-thirds of participants remaining offence-free in the 12 months post-program.[53]

In addition to diversion programs, other community-based orders include sentencing options that are served either full-time or part-time in the community. Depending on the jurisdiction, community-based sentencing options differ in design and title.

CCOs were introduced in New South Wales as part of a number of reforms building on the Law Reform Commission's comprehensive report into sentencing in 2013.[54] That report drew on Australian and international

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[45] Lauren Croft, 'Unpacking the Expansion of the NSW Drug Court to Dubbo', *Lawyers Weekly* (online, 1 November 2021) <https://www.lawyersweekly.com.au/biglaw/32905-unpacking-the-expansion-of-the-nsw-drug-court-to-dubbo>.

[46] Don Weatherburn et al, 'The Long-Term Effect of the NSW Drug Court on Recidivism' (2020) 232 *Crime and Justice Bulletin* 1.

[47] Croft (n 45).

[48] Joy Wundersitz, 'Criminal Justice Responses to Drug and Drug-related Offending: Are They Working?' (Technical and Background Paper No 25, Australian Institute of Criminology, 2007). See, eg, *Drug Court Act 1998* (NSW) s 3(2); *Young Offenders Act 1997* (NSW) s 3; *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW) s 14.

[49] Wundersitz (n 48).

[50] Katie Willis and Jennifer Ahmad, 'Intermediate Court Diversion in Australia' *Cannibus Information & Support* (Web Page) <https://cannabissupport.com.au/intermediate-court-based-diversion-in-australia/>.

[51] See Michelle Airey and Joanna Wiese, 'How the WA Pilot Drug Court is Progressing: A Lawyer's Perspective' (2001) 28(10) *Brief* 12; Toni Makkai and Keenan Veraar, 'Final Report on the South East Queensland Drug Court' (Technical and Background Paper Series No 6, Australian Institute of Criminology, 2003).

[52] Don Weatherburn et al, 'The NSW Drug Court: A Re-evaluation of its Effectiveness' (2008) 121 *Crime and Justice Bulletin* 1.

[53] Grace Skrzypiec, Lisa Wundersitz and Helen McRostie, 'Magistrates Court Diversion Program: An Analysis of Post-Program Offending' (Office of Crime Statistics and Research, 2004).

[54] New South Wales Law Reform Commission, *Sentencing* (Report No 139, July 2013) ('*Sentencing*')

research concerning the use of community supervision in combination with programs that target the causes of crime to reduce offending, and which ultimately found that community supervision is better at reducing reoffending than leaving offenders in the community without supervision, support or access to programs.[55] What's more, community supervision was found to be better at reducing reoffending than a short prison sentence.[56] Significantly, the reforms make it clear that community safety is not just about incarceration, and that community supervision and programs are a legitimate tool to that end.[57]

In addition to strengthening the existing Intensive Correction Order (ICO), the reforms introduced CCOs as 'a more flexible order' permitting courts to tailor sentences through the imposition of a range of conditions suitable to the circumstances of the offender.[58]

Unlike ICOs, which are an alternative to full-time imprisonment, CCOs are a non-custodial sentencing option imposed following conviction.[59] CCOs cannot exceed three years of duration and in addition to the two standard conditions, namely that the offender must not commit any offence and must appear before court as called to do so, the offender may be subject to additional and/or further conditions.[60]

Section 89 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) outlines seven additional conditions that may be imposed and includes a community service work condition requiring the performance of community service work for a specific number of hours, a rehabilitation or treatment condition requiring the offender to participate in a rehabilitation program or to receive treatment, an abstention condition requiring abstention from alcohol or drugs or both, and a supervision order requiring the offender to submit to supervision by a community corrections officer.[61] A separate provision permits the Court to impose further conditions on a CCO as it sees fit, so long as those further conditions are not inconsistent with the additional conditions.[62] A key difference between CCOs and ICOs is that, unlike ICOs, the additional conditions of home detention, electronic monitoring, or a curfew in excess of 12 hours in any 24-hour period cannot be imposed on a CCO.[63]

A mere two years after its introduction, the CCO regime had led to a reduction in the proportion of offenders serving short prison sentences.[64] As of March 2022, there were almost 79,000 people in Australia on community-based corrections orders, nearly twice as many as there were in prison,[65] although the most recent figures on funding show the $3.88 billion budget for prisons dwarfs the $0.76 billion allocated to community

[55] See ibid 150-170.
[56] Crime and Justice Reform Committee, Submission to the NSW Law Reform Commission, *Preliminary Submission on Sentencing* (2012) 3, cited in *Sentencing* (n 54) 150.
[57] *Parliamentary Debates* (n 17) 3.
[58] Ibid 2.
[59] *Crimes (Sentencing Procedure) Act 1999* (NSW) s 8.
[60] Ibid s 85(2), 87, 88.
[61] Ibid s 89.
[62] Ibid s 90.
[63] Ibid s 89(3).
[64] Neil Donnelly, 'The Impact of the 2018 NSW Sentencing Reforms on Supervised Community Orders and Short-term Prison Sentences' (2020) 148 *Crime and Justice Statistics* 1.
[65] Australian Bureau of Statistics, *Corrective Services, Australia, March Quarter 2022* (Report, 9 June 2022). The number of people in prison was 40,330.

corrections.[66] In 2018, it was calculated that prison costs on a per capita basis are over nine times more than community corrections.[67]

Success in community-based initiatives is hard won but may be readily lost or set back. There will invariably be a hue and cry when a serious offence is committed by an offender in the community, as there was in September 2012 following the rape and murder of Jill Meagher by parolee Adrian Bayley in Melbourne, which prompted public outrage and subsequently, a scathing review of the Victorian parole system.[68] This, by association, engendered scepticism of community corrections orders more broadly.[69] The Victorian government responded by extensively reforming its parole regime and another law and order crisis temporarily subsided.[70] However, it was only a matter of time before other similar crises arose, with later crises generated when homicides were committed by parolees in Queensland[71] and the Northern Territory.[72] In addition, one of the biggest constraints on public support for community-based orders is a concern that offenders diverted from prison are, to use the vernacular, 'getting away with it'.[73]

It should also be observed that, while a common fixture in sentencing today, community-based orders started out like any other innovation in criminal justice, perceived as a radical change and met with a healthy dose of scepticism. But as the promises of greater flexibility and community supervision and engagement were realised, community-based orders entered the mainstream of sentencing-based options.

From a broader perspective, the legitimisation of community-based orders in the framework of sentencing has given credence to the pursuit of more ambitious criminal justice innovations, such as the implementation of circle sentencing in our State, the topic to which I now turn.

V. CIRCLE SENTENCING

Circle sentencing is a remarkable innovation which is of particular importance in addressing the levels of Indigenous incarceration to which I referred earlier. Circle sentencing involves a magistrate or a judge working collaboratively with elders, victims and the offender's family and other support people to determine an appropriate sentence while also addressing the underlying problems that have brought the offender to court.[74]

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66 Productivity Commission, *Report on Government Services – Corrective Services* (Report, 22 January 2021).

67 Australian Institute of Criminology, *How Much Does Prison Really Cost? Comparing the Costs of Imprisonment with Community Corrections* (Report No 5, 24 April 2018) x.

68 Lorana Bartels and Don Weatherburn, 'Building Community Confidence in Community Corrections' (2020) 32(3) *Current Issues in Criminal Justice* 292, 293.

69 Ibid.

70 Ibid.

71 Josh Bavas, 'Parole Board Changes Announced After 81yo's Murder in Townsville', *ABC News* (online, 5 July 2017) <https://www.abc.net.au/news/2017-07-05/new-parole-board-overhaultakes-effect-in-queensland/8679804>.

72 Stephanie Zillman, 'Parole Audit After Darwin Shooting Exposes Flaws in Monitoring of Criminals', *ABC News* (online, 29 June 2019) <https://www.abc.net.au/news/2019-06-25/parole-reportreleased-nt- government-gunner-darwin-shooting/11244972>.

73 Bartels and Weatherburn (n 68) 301.

74 'Indigenous Issues and Indigenous Sentencing Courts', *Australasian Institute of Judicial Administration Inc.* (Web Page) <https://aija.org.au>, cited in Australian Law Reform Commission, *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report 133, December 2017) [10.33] ('*Pathways to Justice*')

Collectively, participants form what is referred to as 'the circle'.[75] The circle manifests a significant deviation from the standard sentencing approach as authority is shared between participants engaging in a round table dialogue.[76]

The circle sentencing model adopted in New South Wales is an adaptation of a circle sentencing model which originated in Canada in 1992 for the sentencing of Indigenous offenders.[77] The flexible framework of the model was designed to reflect the diversity of First Nations communities in New South Wales and to allow for local community engagement and participation in the sentencing process to meet local culture and experiences.[78]

Circle court deliberations are power-sharing arrangements typically between the following combination of participants.[79] There is the presiding magistrate, who ensures the proceedings are conducted fairly, that all parties are given an opportunity to participate and that the participants themselves remain focused on the issues at hand.[80] The presiding magistrate also ensures that the law is applied.[81] For example, the magistrate outlines the sentencing alternatives available to the circle and ensures that the sentences imposed by the circle are within current sentencing guidelines.[82] There are typically up to four Aboriginal elders, usually two men and two women, selected on the basis of their experience with the offender, victim and/or the nature of the offence.[83]

In addition to the offender, defence lawyer and prosecutor, other participants may include the court's Program Officer, family members of the offender, and where possible, the victim and their support person.[84] In some circle sentencing courts, the circle will be supplemented by staff or liaison officers from local Aboriginal-controlled community organisations, who assist in formulating sentencing plans by co-ordinating appointments with counsellors, rehabilitation programs and the like.

During the circle deliberations, participants sit in a circle and discuss matters including the background of the offender, the offence, the impact of the offending on the victim, how similar crimes have been affecting the local community, what can be done to prevent further offending, and how all of this can be incorporated into a sentencing plan.[85] Whilst the presiding magistrate retains ultimate control of the process and decision, members of the circle have input into the formulation and determination of the penalty.[86]

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[75] Ivan Potas et al, *Circle Sentencing in New South Wales – A Review and Evaluation* (Judicial Commission of New South Wales, October 2003) 7.
[76] Ibid 7-8.
[77] Ibid 3-4.
[78] Ibid 4.
[79] Ibid.
[80] Ibid 5-6.
[81] Ibid 6.
[82] Ibid.
[83] Steve Yeong and Elizabeth Moore, 'Circle Sentencing, Incarceration and Recidivism' (2020) 226 *Crime and Justice Bulletin* 4.
[84] Ibid.
[85] Ibid.
[86] Ibid.

Circle sentencing was introduced in our State against the background of 'the sense of powerlessness and alienation felt by many Aboriginal people caught up in the criminal justice system' revealed by the Royal Commission into Aboriginal Deaths in Custody.[87] Research established the overwhelming view that First Nations people mistrusted the justice system, including the courts.[88] Aside from feeling that they had limited input into the judicial process generally and sentencing deliberations specifically, First Nations people reported finding the courts 'culturally alienating, isolating and unwelcoming to community and family groups' and that aspects of the Australian legal system were difficult to understand. [89]

The process of circle sentencing aims to alleviate these entirely understandable considerations by promoting concepts of respect, validation and, critically, self- determination. [90]

Circle sentencing was introduced in the Local Court of New South Wales in 2002 in Nowra.[91] In the same year, Victoria's first Koori Court was established in the northern Victorian city of Shepparton.[92] The success of circle sentencing initiatives in Nowra and Shepparton has spawned circle sentencing in other locations, some 12 in New South Wales[93] and 13 in Victoria,[94] as well as in other courts, as I shall explain.

Studies attest to the power of circle sentencing in reducing barriers between First Nations communities and the court and improving confidence in the sentencing process.[95] A 2020 New South Wales Bureau of Crime Statistics and Research (BOSCAR) study established an association between circle sentencing, reoffending and imprisonment, with participating offenders 9.3% less likely to receive a prison sentence and 3.9% less likely to reoffend within 12 months.[96]

The Youth Koori Court, which has been operating within the Children's Court of New South Wales since 2015, provides circle sentencing for young First Nations offenders and involves the making of pre-sentence Support Plans that address relevant risk factors that may impact on the young person's continued involvement with the criminal justice system.[97]

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[87] Jenny Blokland, 'Foreword' in Paul Bennett, *Specialist Courts for Sentencing Aboriginal Offenders— Aboriginal Courts in Australia* (Federation Press, 2016) v, quoted in *Pathways to Justice* (n 74) [10.31].
[88] John Tomaino, 'Aboriginal (Nunga) Courts – Information Bulletin' (2010) 39 *Information Bulletin* 2.
[89] Ibid.
[90] *Pathways to Justice* (n 74) [10.33].
[91] Potas et al (n 75) 10.
[92] Gerard Bryant, 'Koori Court, Shepparton Victoria' (2008) 7(7) *Indigenous Law Bulletin* 19, 19.
[93] Yeong and Moore (n 83) 3.
[94] Koori Court, *Magistrates' Court of Victoria* (Web Page, 13 September 2022) <https://www.mcv.vic.gov.au/about/koori-court>.
[95] See, eg, Yeong and Moore (n 83).
[96] Ibid 1.
[97] Children's Court of New South Wales, *Practice Note No 11: Youth Koori Court*, 1 February 2019 ('*Practice Note No 11 – Youth Koori Court*').

The Court was conceived following significant consultation first within the Children's Court and then in late 2013 with relevant stakeholders to assess the feasibility of establishing a Youth Koori Court in New South Wales.

A year later, in November 2014, the Court was launched and by January 2015 was accepting referrals, with its first sitting taking place at Parramatta Children's Court on 6 February 2015, preceded by a smoking ceremony which saw members of the judiciary sitting side-by-side with elders of Western Sydney. Two young people were admitted to the Youth Koori Court program on that day.

Exactly four years later, on 6 February 2019, another ceremonial sitting took place to mark the Youth Koori Court's first sitting at Surry Hills Children's Court.

Disconnection with court process is not uncommon for young people, whether or not they are Aboriginal, but the lack of connection and perception of bias in mainstream criminal courts have an important historical context for First Nations youth.[98] Further, there is evidence to suggest that in certain communities, prison has lost a degree of its deterrent effect for First Nations youth, perhaps even having become akin to a 'rite of passage' rather than a 'source of shame or embarrassment'.[99] Deep distrust of the criminal justice system more broadly impacts on the over-representation of First Nations youth in custody.[100]

The Youth Koori Court draws on this evidence to inform its short, medium and long-term outcomes across the domains of empowerment, social and community, health, safety, economic, home, and education and skills.[101] Short-term outcomes across these domains primarily focus on identifying the needs of participants.[102] Intermediate outcomes focus on addressing the needs of participants, and long-term outcomes focus on the change created within the criminal justice system.[103]

Careful thought has also gone into courtroom layout and dynamic. The Youth Koori Court sits in a courtroom in which artworks prepared by young people in custody at each of the juvenile justice centres in New South Wales have been hung. It is only at the point of sentence that the magistrate will robe, a feature that is designed to make the Court less alienating to its young participants.

The Youth Koori Court pathway is as follows:[104]

- A referral to the Youth Koori Court is made (only) on the application of the young

[98] See Harry Blagg, *Crime, Aboriginality and the Decolonisation of Justice* (Hawkins Press, 2008) 11.
[99] Dan Weatherburn, *Arresting Incarceration – Pathways out of Indigenous Imprisonment* (Aboriginal Studies Press, 2014) 7.
[100] See Blagg (n 98) 65-68.
[101] Melissa Williams et al, 'Youth Koori Court: Review of Parramatta Pilot Project' (Western Sydney University Aboriginal and Torres Strait Islander Employment and Engagement Advisory Board, 2017).
[102] Inside Policy, *An Evaluation of the Youth Koori Court Process – A Final Report Prepared by Inside Policy for the NSW Department of Communities and Justice* (Final Report, 6 June 2022) 18.
[103] Ibid.
[104] *Practice Note No 11 – Youth Koori Court* (n 97); Williams et al (n 101) 42, 58-61.

person.

- In the first week, the young person attends a mention in the Children's Court where they either enter a plea of guilty, make an admission, or the charges against them are otherwise proven after hearing. The young person is then assessed for eligibility to be referred to the Youth Koori Court.
- Week three, the young person attends a mention at the Youth Koori Court to enable the Court to apply a screening tool to confirm their suitability for the program. If they are suitable, the young person is referred to a Youth Koori Court Conference. Bail conditions may also be reviewed at this stage.
- Week five is when the Conference typically takes place. The Conference is facilitated by a magistrate in Court and attended by one elder and the young person's parents or agency representatives from Family and Community Services. It is during the Conference when the young person's Action & Support Plan is prepared, and relevant agencies and support people commit to supporting the young person to achieve that Plan. The Plan might set out ways for the young person to improve his or her cultural connections, stay at school or get work, have stable accommodation and/or sort out any health, drug or alcohol issues. The young person is asked to identify programs that may enable him or her to reduce the risks of further offending. Once everyone has agreed on a Plan, the young person returns to the Youth Koori Court for the magistrate to approve the Plan. The young person then commences the Plan.
- Over the next few weeks, the young person's progress is monitored by their Youth Justice Caseworker, who prepares a Progress or Pre- Sentence Report for the magistrate.
- In week 17 the young person returns to the Youth Koori Court for a mention or for sentencing. A magistrate and two elders preside, and the Caseworker submits their Report. At the mention, the Support Plan is revised if necessary and the young person's bail is reviewed. The young person will return to the Court in week 29 for sentencing. Alternatively, the young person is sentenced in week 17. The sentence is imposed by the magistrate sitting alone after taking into account all submissions from the prosecution and defence in the normal course, any input from elders and/or respected persons, and the Report prepared by the young person's Youth Justice Caseworker detailing the young person's performance over the past few weeks of goals specified in the Plan. The magistrate alone has responsibility for the sentence, and all sentencing options remain available to the Court. The program concludes with acknowledgement of the young person's efforts and is marked with a presentation of artefacts or other rewards of significance.

It has been seven years since the Youth Koori Court commenced operations in our State. As at March 2022, there had been 195 referrals to the Court, with 190 of those young persons admitted to the program.

During those seven years the Youth Koori Court has garnered overwhelming support from its staff and stakeholders, as well as participants and their family members.[105] This is because the Court actually achieves better outcomes for young Aboriginal people and for the criminal justice system, compared to the standard Children's Court process.[106] Beyond achieving its short-term outcomes of identifying participant needs and risk factors for offending, the Court is successfully empowering First Nations communities through a high-level of engagement in the process which has in turn increased trust in the system.[107]

It is clear that the Youth Koori Court has the potential to make a very real difference in the lives of First Nations youth and their communities. This potential should see the program expanded to other locations, particularly in areas of rural New South Wales where there is a real need to address the high rates of crime and incarceration among First Nations people in general, and in particular, among young people.

In April of this year, the New South Wales District Court launched the Walama List at the Downing Centre in Sydney following a two-month pilot.

The Walama List has been specifically designed for the sentencing of adult Aboriginal and Torres Strait Islander offenders who have committed indictable offences. It follows the lead of the Victorian County Koori Court, which was established in 2008, as well as drawing on aspects of the tailored approach to sentencing followed by the Drug Court of New South Wales,[108] the work and experience of the Youth Koori Court and circle sentencing in the Local Court of New South Wales and in other jurisdictions.

The Walama List adopts a more therapeutic and holistic approach to sentencing Aboriginal and Torres Strait Islander offenders by bringing elders and community members into discussions with the sentencing judge, and requiring more involvement and intensive effort on behalf of offenders.[109] It also provides culturally specific diversionary programs,[110] in addition to processes of circle sentencing, as a key aspect of the effort to reduce the overrepresentation of First Nations people in custody and the adverse impact of mass incarceration of First Nations families and communities.[111]

'Walama' means to 'come back' or 'return' and with the launch of the Walama List, advocates and participants within the Walama court process hope to achieve a 'coming back to identity, community, culture,

[105] Inside Policy (n 102) 7.
[106] Ibid.
[107] Ibid.
[108] *The High Level of First Nations People in Custody* (n 37) 69-70.
[109] Emily Nicol, 'The Walama List: How Culture Over Crime Hopes to Reduce Incarceration', *NITV* (online, 7 April 2022) <https://www.sbs.com.au/nitv/article/the-walama-list-how-culture-over-crime-hopes-to-reduce-incarceraton/7b7unbcu1>.
[110] The Special Commission into the Drug Ice found that, given the overrepresentation of First Nations people in custody, culturally specific diversionary programs present an opportunity to improve the way the criminal justice system responds. The participation of First Nations grassroots organisations and/or dedicated Community Corrections officers is strongly encouraged to provide a more intensive process of supervision: *Special Commission of Inquiry into Crystal Methamphetamine and other Amphetamine* (n 36) xliii.
[111] Dina Yehia, 'Introducing the Walama List Pilot at the District Court of New South Wales' (2021) *Judicial Officers' Bulletin* 114.

and a healthy, crime-free life'.[112] With a focus on increasing compliance with court orders and reducing recidivism, the List has set a goal to reduce the incarceration rate of First Nations people by 15 per cent come 2031.[113]

In the words of the inaugural List Judge, Judge Dina Yehia SC (as her Honour then was), 'it is an ambitious task, but a hopeful start'.[114] I echo that sentiment. Justice Yehia has also said that '[h]aving elders lead the conversation means they bring cultural authority to the process which leads to a higher level of engagement by participants.'[115]

Returning to the concept of innovation as investment, an independent evaluation of the Youth Koori Court earlier this year established that the Court, as it currently operates, returns $2 for every $1 invested.[116] But the value of the process lies in much more than economic savings or returns.

Studies of comparable courts in other jurisdictions have reported similar success.[117] One example is the Galambany Court operating in the ACT Magistrates Court.[118] Like Circle Sentencing Courts in New South Wales, the purpose of the Galambany Court is to provide a culturally appropriate sentencing option for Aboriginal and Torres Strait Islander offenders. A recent analysis suggests that by incorporating local elders, community leaders and practices, the Galambany Court has improved the standing of Aboriginal and Torres Strait Islander people in the ACT justice system and has also improved the wellbeing, health, education and economic outcomes of offenders sentenced and their families, in turn providing substantial economic benefits to the ACT, particularly by reducing demands on government agencies, such as police, courts, hospitals, foster care and emergency housing.[119]

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[112] Dina Yehia, 'Walama List Factsheet', *NSW Aboriginal Affairs* (Web Document, 2021) 1 <https://www.aboriginalaffairs.nsw.gov.au/media/website_pages/our-agency/news/pilot-of-specialist-approach-for-sentencing-aboriginal-offenders/Walama-List-Fact-Sheet.pdf>

[113] Nicol (n 109).

[114] Quoted in ibid.

[115] Ibid.

[116] Inside Policy (n 102) 7.

[117] A 2011 evaluation of the Victorian County Koori Court found it to be 'more engaging, inclusive and less intimidating than the mainstream court'. This was even the case where the offender did not agree with the sentence imposed by the court: County Court of Victoria and the Department of Justice, *County Koori Court: Final Evaluation Report* (Final Report, 2011) 3, 49.
A 2010 evaluation of Murri Courts in Queensland observed its 'considerable success' in improving relationships between Aboriginal and Torres Strait Islander communities and Queensland Magistrates Courts. The study found an increase in appearance rates, an increase in opportunity for those appearing to be linked up with rehabilitative services, and that the initiative was 'highly valued' among Aboriginal and Torres Strait Islander community stakeholders: Anthony Morgan and Erin Louis, 'Evaluation of the Queensland Murri Court: Final Report' (Technical and Background Paper No 39, Australian Institute of Criminology, 2010) 150.
A 2008 evaluation of Aboriginal Sentencing Conferences in South Australia's Nunga Courts found that conference was likely to be a more effective deterrent for Aboriginal and Torres Strait Islander offender than mainstream court due to its relevance to Aboriginal people, the participation of Elders, the case management into relevant services, and the provision of relevant information to the court, which leads to 'more effective sentencing': Office of Crime Statistics and Research, *Port Lincoln Aboriginal Adult Conference Pilot: Review Report* (Report, 2008) iii.

[118] Anne Daly, Greg Barrett and Rhiân Williams, 'Costs Benefit Analysis of Galambany Court' (Justice and Community Safety Directorate, ACT Government, November 2020).

[119] Ibid 4.

Notwithstanding the overwhelmingly positive results of circle sentencing models, it is important not to overestimate their role in delivering criminal justice in New South Wales. The work of improving criminal justice outcomes for First Nations people cannot be achieved only in a limited number of specialist courts but must occur across the breadth of the criminal justice system. As was said by the former Chief Justice of New South Wales, Tom Bathurst AC KC, in a speech delivered late last year:

> While Circle Sentencing amounts to a significant step in the right direction, the model must not be considered as a panacea for Aboriginal justice concerns. Circle Sentencing is essentially peripheral to the workings of the mainstream criminal justice system, with comparatively few Aboriginal offenders actually appearing before Circle courts.[120]

Bathurst CJ then went on to say:

> …the extent to which Circle Sentencing can effectively deal with the problem of Aboriginal incarceration is an open question. Nevertheless, it is undoubtedly a step in the right direction. Moving forward, we must draw from the success story of Circle Sentencing, and reckon with the room for improvement, to more effectively incorporate Aboriginal customs, practice and healing into all aspects of our criminal justice system.[121]

VI. Conclusions

In drawing this lecture to a close, let me try and unite Sir Ninian Stephen and the 30th anniversary of this law school by returning to his remarks 30 years ago, at the opening of the Law School of Griffith University. On that occasion, Sir Ninian said this – which can readily be applied to Newcastle's own experience:

> One thing that sets law schools apart from all other of the disciplines taught at universities is that, like the profession of law itself, a law school necessarily has particular structural links with the governance of the community; it has a very real public role. Those of its graduates who go on to practise law will form a part of the resource from which the judiciary of the State and of the Commonwealth is selected, and that resource will also provide the community with its legal practitioners and law officers, its parliamentary draftsmen and, for that matter, a proportion of its legislators. So that the future shape and well- being of a community's legal system and the essence of its governance under the rule of law lies very much in the hands of its law schools.[122]

How true.

Congratulations to the Newcastle University Law School and thank you for your warm hospitality as ever.

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[120] Thomas F Bathurst, 'A History of Sentencing Law Since Francis Forbes, 1823' (Speech, Francis Forbes Society Legal History Tutorials, 22 September 2021) 23.
[121] Ibid.
[122] Stephen (n 1) 1-2.